BRB No. 97-1094 BLA

ROBERT H. HESS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Robert H. Hess, Pottsville, Pennsylvania, *pro se*.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order (96-BLA-0988) of Administrative Law Judge Paul H. Teitler denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Claimant originally filed for benefits on November 6, 1991. Director's Exhibit 1. In a Decision and Order dated August 17, 1989, Administrative Law Judge Frank Marden found that claimant established twenty years of coal mine employment. The administrative law judge also found, however, that claimant failed to establish the existence of

pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 60. Benefits were accordingly denied and claimant appealed. In a Decision and Order dated January 31, 1995, the Board affirmed the denial of benefits. *Hess v. Director, OWCP*, BRB No. 94-2582 BLA (Jan. 31, 1995) (unpub.); Director's Exhibit 63. Within one year, claimant submitted additional evidence and requested modification. Administrative Law Judge Teitler found that, based on the newly submitted evidence and the evidence submitted in connection with the original file, claimant again failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(c) and thus failed to establish modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were again denied. In the instant appeal, claimant generally contends that benefits should have been awarded. The Director, Office of Workers' Compensation Programs, urges affirmance of the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings of fact and conclusions of law if rational, supported by substantial evidence, and consistent with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that substantial evidence supports the denial of benefits under 20 C.F.R. Part 718. The administrative law judge properly found that the newly submitted evidence as well as the evidence submitted in connection with the original file failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a). The administrative law judge rationally concluded that the weight of the x-ray evidence was negative for the existence of pneumoconiosis. Decision and Order at 4-5, 9-10. The administrative law judge also permissibly relied upon the qualifications of the readers in his consideration of the evidence. The administrative law judge therefore rationally found that claimant failed to establish

the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Additionally, as the record contains no biopsy or autopsy evidence, and as none of the presumptions found at 20 C.F.R. §§718.304, 718.305 and 718.306 are applicable,[1] the administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis at Sections 718.202(a)(2) and (3). *See* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 10. Finally, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as the weight of the more comprehensive and more credible medical opinions did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry, supra*. The administrative law judge permissibly found Dr. Kraynak's diagnosis of pneumoconiosis outweighed by the opinions of Drs. Ahluwalia and Levinson, both of whom found that claimant did not suffer from pneumoconiosis, since Dr. Kraynak did not consider claimant's cardiac condition and relied on a minimal smoking history. *Lafferty, supra; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Kuchwara*, *supra*; Decision and Order at 10-12; Director's Exhibits 36, 67, 89; Claimant's Exhibit 1. We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus failed to establish a change in conditions pursuant to Section 725.310, as it is supported by substantial evidence.

[1] The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305 applies to claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant probative evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence as well as the other evidence of record failed to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c)(1)-(2), the administrative law judge permissibly found that the pulmonary function study evidence established total disability pursuant to Section 718.204(c)(1), but that the blood gas study evidence of record was non-qualifying and total disability was not established pursuant to Section 718.204(c)(2).[2] *See* Decision and Order at 5-6, 13. Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right-sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3). *See* Decision and Order at 13, 14; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. (en banc)* 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986).

[2]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

In considering whether total disability was demonstrated pursuant to Section 718.204(c)(4), the administrative law judge permissibly accorded less probative weight to the medical opinion of Dr. Kraynak as his diagnosis was not supported by the objective evidence of record and as the physician failed to explain how the objective data supported his findings in light of the non-qualifying pulmonary function studies and the non-qualifying blood gas studies of record. *Clark*; *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); Decision and Order at 10. In addition, the administrative law judge reasonably determined that the medical opinions of Drs. Ahluwalia and Levinson, that claimant did not have a totally disabling respiratory impairment in spite of qualifying pulmonary function studies, were entitled to the greatest weight since the physicians possessed superior qualifications to Dr. Kraynak. *Clark*, *supra*; *Fields*, *supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1291 (1984); Decision and Order at 14. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge properly found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) and were thus insufficient to establish a change in conditions pursuant to Section 725.310.[3] *Nataloni v. Director, OWCP,* 17 BLR 1-82 (1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Finally, we note that the administrative law judge properly considered the evidence submitted in connection with claimant's original claim and rationally concluded that there was no mistake in fact in the original denial of benefits. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Nataloni*, *supra*; Decision and Order at 8. Consequently, we affirm the administrative law judge's denial of claimant's petition for modification as it is supported by substantial evidence and is in accordance with law.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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[3]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge